IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS

68-0157 (9-06) - 3091078 - EI

CANDACE J LEWIS
Claimant

DARBYSHIRE TRUCKING INC
Employer

APPEAL NO. 10A-UI-14645-LT

ADMINISTRATIVE LAW JUDGE DECISION

OC: 09/19/10
Claimant: Appellant (2)

Iowa Code § 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the October 20, 2010 (reference 02) decision that denied benefits. After due notice was issued, a telephone conference hearing was held on December 9, 2010 with only claimant and her witness participating. The record was reopened due to an Appeals Section office error and concluded on January 4, 2011, with the employer's participation through Shelia Darbyshire and Tom Darbyshire. Claimant participated with her boyfriend, Curtis Doyle.

ISSUE:

The issue is whether claimant was discharged for reasons related to job misconduct sufficient to warrant a denial of unemployment benefits.

FINDINGS OF FACT:

Having heard the testimony and having reviewed the evidence in the record, the administrative law judge finds: Claimant most recently worked part-time on-call as a driver from June 6, 2010 and was separated from employment on August 4, 2010. Her boyfriend, Curtis Doyle, also worked for the employer, but they did not ride or drive together. Her last day of work was July 26, 2010, when her truck went into the shop for repair. She did not ask if work was available using another truck. Most communication about claimant's work duties occurred between Darbyshire and Doyle. Darbyshire did not tell Doyle there was no work for claimant on August 2 and 3 and assumed claimant would simply report for work on Monday as usual, but Doyle and claimant assumed there was no more work the following week. Claimant had recently told Darbyshire she was not happy sitting in line waiting for three or four hours to unload grain. Doyle worked August 3, asked employer about work available for claimant on August 4, and was told there was no work available. About 11 p.m. that night, employer called and told Doyle there was work available for claimant the next day but it was too late for claimant to arrange child care. The trucking industry often gives late notice about work becoming available. Doyle was fired on August 4 for independent reasons and Darbyshire told him to clean claimant's truck out at the same time. The employer had not warned her that her job was in jeopardy for any reason.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

Iowa Code § 96.5-2-a provides:

> An individual shall be disqualified for benefits:
>
> 2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:
>
> a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(7) provides:

> (7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. IDJS*, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what misconduct warrants denial of unemployment insurance benefits are two separate decisions. *Pierce v. IDJS*, 425 N.W.2d 679 (Iowa App. 1988). The determination of whether unexcused absenteeism is excessive necessarily requires consideration of past acts and warnings. The term “absenteeism” also encompasses conduct that is more accurately referred to as “tardiness.” An absence is an extended tardiness, and an incident of tardiness is a limited absence. Absences related to issues of personal responsibility such as transportation, lack of childcare, and oversleeping are not considered excused. *Higgins v. Iowa Department of Job Service*, 350 N.W.2d 187 (Iowa 1984).

A failure to report to work without notification to the employer is generally considered an unexcused absence. Claimant was responsible for reporting to work or communicating with the employer to determine if work was available. Her one unexcused absence due to lack of child care is not disqualifying, since it does not meet the excessiveness standard. Inasmuch as employer had not previously warned claimant about attendance issues leading to the separation, it has not met the burden of proof to establish that claimant acted deliberately or with recurrent negligence in violation of company policy, procedure, or prior warning. An employee is entitled to fair warning that the employer will no longer tolerate certain performance and conduct. Without fair warning, an employee has no reasonable way of knowing that there are changes that need to be made in order to preserve the employment. If an employer expects an employee to conform to certain expectations or face discharge, appropriate (preferably written), detailed, and reasonable notice should be given. Benefits are allowed.

DECISION:

The October 20, 2010 (reference 02) decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible. The benefits withheld shall be paid to claimant.

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Dévon M. Lewis
Administrative Law Judge

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Decision Dated and Mailed

dml/kjw